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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91163999
Party	Plaintiff Sybaritic, Inc. ,
Correspondence Address	BRIAN KIDWELL, ESQ. SYBARITIC, INC. 9220 JAMES AVENUE BLOOMINGTON, MN 55431
Submission	Motion to Amend Pleading/Amended Pleading
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Date	06/29/2005
Attachments	Amended Not of Opp.pdf (6 pages)

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

SYBARITIC, INC.

Opposer,

v.

THOMAS P. MUCHISKY

Applicant.

Opposition No.: 91/163,999

Serial No.: 78/282,661

AMENDED NOTICE OF OPPOSITION

Commissioner for Trademarks
U.S. Trademark Office
ATTN: TTAB
P.O. Box 1451
Alexandria, VA 22313-1451

Sir:

This Amended Notice of Opposition is being timely filed in response to a decision by the Trademark Trial and Appeal Board dated June 9, 2005. Sybaritic, Inc., a Minnesota corporation, believes it will be damaged by registration of the mark shown in application serial no. 78/282,661, which was filed on August 4, 2003, and hereby opposes the same.

The amended grounds for opposition are as follows:

1. Opposer, Sybaritic, Inc. (hereinafter "Opposer"), is a corporation duly organized and existing under the laws of the State of Minnesota, having its principal place of business at 9220 James Avenue, Bloomington, Minnesota 55431.
2. Opposer is in the business of marketing and selling non-invasive health equipment including hand held massagers.

3. Opposer has been sued in the United States District Court, Eastern District of Missouri by General Physiotherapy, Inc. for trademark infringement of at least U.S. Trademark Registration Nos. 2,039,795, 2,066,217, 2,039,797, 2,041,648 and 2,038,211 in case number 4:03CV01058HEA.

4. Each of the U.S. Trademark Registrations listed in paragraph 3 of this Amended Notice of Opposition is for a design of a hand held massager.

5. Upon information and belief, Applicant owns each of the U.S. Trademark Registrations listed in paragraph 3 of this Amended Notice of Opposition.

6. Applicant seeks to register the design of an applicator for a hand-held massager that consists of a cone-shaped attachment having a firm rubber tip as a trademark for an applicator for a hand-held massager as evidenced by the publication of the mark in the Official Gazette on p. TM206 of the November 2, 2004 issue.

7. Opposer believes that it will be subjected to a lawsuit in the United States District Court for trademark infringement if the mark shown in application serial no. 78/282,661 becomes a registered mark.

8. Opposer has a real interest in opposing the registration of Applicant's mark at issue.

9. If the Applicant is permitted to use and register its mark for its goods, as specified in the application herein opposed, Opposer will be damaged because it will not be able to use or sell a similarly configured functional hand held massage applicator in commerce.

10. Opposer is thereby being damaged by Applicant's attempt to register the design of a hand-held massager that consists of a cone-shaped attachment having a firm rubber tip as a

trademark for an applicator for hand-held massager a trademark in application serial no. 78/282,661.

11. Upon information and belief, the applicator shown in the trademark application at issue has a shape or configuration that is *de jure* functional that cannot function as a trademark.

12. Upon information and belief, the applicator in the trademark application at issue attaches to an automated unit that sends pulsing forces through the applicator and into flesh to massage the muscles beneath the flesh of a person receiving a massage.

13. Upon information and belief, the applicator shown in application serial no. 78/282,661 functionally provides a deep tissue massage that functionally massages trigger points of muscles by providing concentrated pressure through a rounded tipped applicator on an end of a cone.

14. Upon information and belief, the applicator shown in application serial no. 78/282,661 is used in the *Shiatsu* style of massage where the rounded tip of the applicator functionally provides pressure to a patient similar to that of a thumb of a massager.

15. Upon information and belief, applicators similar to the applicator illustrated in application serial no. 78/282,661 have been used since at least the early 1940s.

16. Upon information and belief, a rounded tip is functional for an applicator for a hand held massager to substantially evenly distribute forces over the surface of the rounded tip and into muscles of a person receiving a massage.

17. Upon information and belief, a cone shaped attachment functionally provides a surface shaped for gripping the applicator.

18. Upon information and belief, a cone functionally provides a smooth transition to the rounded tip.

19. Upon information and belief, a firm rubber rounded tip functionally provides a material of construction that feels comfortable when in contact with skin and also functionally transfers the pulsing force to the muscle being massaged.

20. Upon information and belief, a cone shaped attachment permits the application of the rounded tip into recessed areas of the body and localizes the massaging action in small areas while insuring that the grip portion of the applicator does not contact adjacent portions of the body receiving the massage.

21. Upon information and belief, the applicator in the trademark application at issue has not acquired secondary meaning.

22. Upon information and belief, the applicator in the trademark application at issue does not function as a trademark.

WHEREFORE, Opposer, through its attorney, prays that application serial no. 76/282,661 be rejected and the mark therein sought for the goods specified in that application be denied and refused.

All correspondence should be addressed to **Peter J. Ims**, Westman, Champlin & Kelly
P.A., 900 Second Avenue South, Suite 1400 – International Centre, Minneapolis, MN 55402.

Respectfully submitted,

Westman, Champlin & Kelly, P.A.

Dated: June 29, 2005

By:

A handwritten signature in dark ink, appearing to read "Peter J. Ims", is written over a horizontal line.

Nickolas E. Westman

Peter J. Ims

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**ATTORNEYS FOR OPPOSER
SYBARITIC, INC.**

CERTIFICATE OF SERVICE

I certify that:

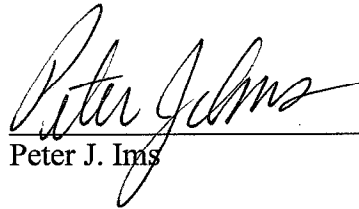
I am over the age of 18 and am not a party to this action. My business address is Westman, Champlin & Kelly, P.A., Suite 1400 - International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3319.

On **June 29, 2005**, a copy of the following document:

Amended Notice of Opposition

was delivered via first class, U.S. Mail to:

Lionel L. Lucchesi, Esq.
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131



Peter J. Ims